PP

v.

CHUNG WAN LI

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CRIMINAL APPEAL NO: 41-23-2004-11]
23 AUGUST 2005

CRIMINAL LAW: *Film Censorship Act 2002 - Section 5(1) - Possession of obscene films - Proof - Search list did not contain description of each and every VCD seized - Viewing done only on 4 of 18 VCDs seized - Whether evidence fatally flawed - Whether no prima facie case proved*

The accused in this case was charged with an offence under s. 5(1) of the Film Censorship Act 2002 for possessing 18 obscene films (in the form of VCDs). Before the learned Magistrate, evidence was *inter alia* adduced that: (i) the 18 VCDs ('exh. P1') were seized from the accused as a result of a raid conducted by officers of the Ministry of Home Affairs; (ii) a search list ('exh. P2') had been prepared in respect of the seizure and was acknowledged by the accused; and (iii) a random screening was done with the consent of the court on four of the VCDs all of which were found to be obscene. The evidence notwithstanding, the learned Magistrate ruled that there was doubt as to the identity of the exhibits seized. It was further ruled that the prosecution, at the end of its case, had failed to prove a *prima facie* case against the accused. The learned Magistrate hence acquitted and discharged the accused without calling for his defence whereupon the prosecution appealed.

Held (dismissing the appeal):

[1] The identity of the 18 VCDs is central to proving possession of the VCDs by the accused. (p. 507 d)

[2] The evidence as adduced by the prosecution is tainted with grave doubt as to the identity of the 18 VCDs. Exhibit P2 did not list the title of each and every one of the VCDs but merely stated "18 Keping VCD Perbagai Tajuk" - thereby rendering uncertain the identity of the 18 VCDs. Further, whilst PW1 testified that he had handed exh. P1 to PW5, PW5 himself testified that he had received exh. P1 from one Encik Alias. In view of the contradiction, and since Encik Alias had not been called as a witness, there was doubt as to whether the 18 VCDs which PW1 had handed to PW5 were indeed the ones that were handed by Encik Alias to PW5.

This aside, the evidence of PW4 that the raiding party had seized only five VCDs left the court in a state of uncertainty as to whether the number of VCDs seized from the accused were 5 or 18. (pp. 504 f-i & 505 h)

[3] The screening of each and every one of the 18 VCDs is necessary to determine whether they were obscene films or otherwise. Here, as per the finding of the learned Magistrate, not only that only four of the VCDs were screened, but the titles of the four VCDs were also not identified. Hence, there was no evidence before the court as to which four of the 18 VCDs were obscene. Neither was there proof whether the remaining 14 VCDs were of obscene material or otherwise. (p. 507 h)

[4] The learned Magistrate could not be faulted for allowing the prosecution's application to conduct random screening. The permission so granted is not a waiver of the burden placed on the prosecution to prove each and every essential ingredient of the charge for the purpose of establishing a *prima facie* case. (p. 508 a-b)

Case(s) referred to:
San Soo Ha v. PP [1968] 1 MLJ 34 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 64, 158
Film Censorship Act 2002, ss. 5(1), (2), 36

For the appellant - Syarifuddin Hj Abdul Rasa; DPP
For the respondent - Siew Chen Fui (Roger Chin; M/s Roger Chin & Co); M/s Awang Chua Voon Ting Ronald & Co

Reported by Rose Aziz

JUDGMENT

Lau Bee Lan J:
The public prosecutor (PP) has appealed against the order of the learned Magistrate made on 14 September 2004 in discharging and acquitting the respondent without calling for his defence.

The respondent (accused in the court below) Chung Wan Li was charged with the following amended charge:

> Bahawa kamu pada 18 November 2002 jam lebih kurang pukul 3ptg bertempat di Best Multi Communication, No. 889, Tabuan Jaya Shopping Centre, 93500 Kuching, Sarawak didapati ada memiliki sebanyak 18 keping filem dalam bentuk

VCD pelbagai tajuk yang didapati lucah dan dengan demikian kamu telah melakukan kesalahan di bawah s. 5(1) Akta Penapisan Filem 2002, dan jika sabit kesalahan boleh dihukum di bawah s. 5(2) Akta yang sama.

The PP has appealed upon four grounds which I shall deal with accordingly.

1st Ground

In respect of the 1st ground, it is the prosecution's contention that the learned Magistrate erred in law and in fact in coming to the conclusion that there is doubt on the identity of the exhibits seized (P1) based on the following grounds:

(i) no record of proof ("1st point");

(ii) some of the exhs. P1, the title was in Chinese character, thus PW1, PW2 and PW3 cannot be so sure that the title in exh. P2 was similar to the exhibits they seized ("2nd point"); and

(iii) since Encik Elias was not called to testify, it is not safe to conclude that the 18 obscene VCD (video cakera padat) received by PW5 was the same as that seized by PW1 and his colleagues ("3rd point").

In respect of the 1st point, the learned DPP submitted that the learned Magistrate has erred because he himself allowed the random testing of 18 VCDs upon the application of the Prosecuting Officer as is evident from the following evidence:

P.O. : Pohon uji tayang secara random

Court : Proceed

Court : The screening has been done.

In respect of the 2nd point, the prosecution submitted that the learned Magistrate erred because exh. P2, the Search List No. 000172 dated 18 November 2002 was acknowledged by the accused himself.

In relation to the 3rd point, the prosecution contended there was no necessity to call Encik Elias B. Mat Rabi because there is no need for corroboration and the accused was not prejudiced in any event because Encik Elias was not a member of the raiding team.

On the other hand, in rebuttal to the 1st point, Mr. Roger Chin submitted that it was incumbent for the prosecution to prove each and every ingredient of the charge ie, one of which is that the 18 VCDs must be confirmed to be obscene. He argued that no explanation was proffered for the prosecuting officer's application to carry out random sampling of the VCDs and neither

should the learned Magistrate be faulted for conceding to their application as it is not the learned Magistrate's duty to teach the prosecution as to the proper procedure to adopt.

In respect of 2nd point, Mr. Roger Chin submitted that notwithstanding that exh. P2 was acknowledged by the accused, the titles of the 18 VCDs were not listed rendering the identity of 18 VCDs seized from the accused to be uncertain.

For the 3rd point, Mr. Roger Chin submitted that the failure of the prosecution to call Encik Elias leaves the prosecution's evidence in a state of great doubt and further, it cannot be said that the accused was not prejudiced because there was a serious break in the chain of evidence as there is doubt as to who handed the 18 VCDs to the Investigating Officer, Raja Husin b. Raja Ibrahim (PW5).

I am of the view that the submission of the learned DPP in respect of the 1st ground comprising the 1st to the 3rd points is without merit. The charge preferred against the accused under s. 5(1) of the Film Censorship Act 2002 ("the Act") requires proof of two essential ingredients:

(a) the accused was in exclusive possession at the material time, ie, 3p.m. on 18 November 2002 of the 18 obscene film's in the form of VCD; and

(b) that the 18 film's are of obscene material.

An examination of the evidence adduced by the prosecution, as pointed out in the Written Submission of the defence (encl. 8), is tainted with uncertainty and grave doubt as to the identity of the 18 VCDs because:

(i) Exhibit P2, the "Pengakuan Rampasan" form (Search List) failed to list the titles of each and every one of the 18 VCDs allegedly seized by the Kementerian Dalam Negeri (KDN) officers on 18 November 2002, the date the raid was conducted at accused's shop; thus rendering the identity of the 18 VCDs in doubt;

(ii) PW1, Yusri bin Hajudin, one of the members of the raiding team testified that after seizing exh. P1, he handed them to PW5 whereas PW5 testified that he received exh. P1 from Encik Elias B. Mat Rabi (not called as witness). Hence there is a serious contradiction as to whether the 18 VCDs which PW1 handed to PW5 were indeed the same ones that were handed by Encik Elias to PW5 since exh. P2, the Search List prepared by PW1 had not contained a description of each and every title of the 18 VCDs seized, but merely stated "18 Keping VCD Pelbagai Tajuk.

In addition to the above, I am of the view that there are other factors raised by the defence which ought to have been given weight to also, although not mentioned in the Petition of Appeal, namely:

(iii) Exhibit P5, the list of 18 VCDs prepared by PW5, I agree, lacks evidential value as it was not prepared at the place of seizure.

(iv) It is also relevant to consider that the prosecution's evidence revealed that PW1, PW2, Joseph Tiang ak Setu and PW3, Atom ak Peter (the photographer) testified that they seized 18 VCDs from the accused on 18 November 2002 whilst PW4, Ezlan bin Sobeng, the KDN officer who impersonated as a customer and who allegedly purchased VCDs from the accused, testified that the raiding team only seized the five VCDs which he had brought back to the accused's shop for exchange at the material time. This is evident from PW4's testimony during examination-in-chief at p. 15 of the Record of Appeal, lines 24 to 29) as:

> Masuk kedai tertuduh 2.35ptg.
>
> Dari masuk hingga seterusnya, masuk dan ingin tukar VCD tersebut, katakan penukaran dibuat saya memberi isyarat kepada anggota lain untuk masuk menyerbu.
>
> Ya, VCD lucah yang ada pada tertuduh hanyalah lima keping pada masa itu.
>
> Yang tangkap tertuduh:
>
> Yusri Hajudin, Joseph Tiang ak Setu, Atom ak Peter, Abd. Basir.

And further at p. 16 of the Record of Appeal, lines 15 to 20:

> Ingin membuat penukaran, serah VCD lima keping kepada tertuduh. I open the plastic. I the one who bring these five VCD to the shop.
>
> Selepas buka plastik saya tunjukkan kepada OKT, toleh ke belakang dan tunjuk isyarat dan mereka pun masuk.
>
> Setuju, pegawai KDN ambil lima keping VCD tersebut.
>
> Senarai rampasan saya tak pasti.

From the aforesaid evidence, the court is again left in a state of uncertainty and doubt as to whether the number of VCDs seized from the accused were 5 or 18 in number.

Furthermore, the court is left in a state of doubt as to whether the five VCDs brought to the accused's shop to be exchanged belonged to PW4 or the accused in the light of the following evidence. PW4 testified that he purchased five VCDs from the accused three days before the raid (15 November 2002).

Notwithstanding that PW4 said that he kept the five VCDs in a locked locker, however he admitted that he did not prepare any search list listing the titles of the said five VCDs purchased because the case was under investigation, neither were the titles of the five VCDs recorded in his ID and he candidly admitted that he did not hand them over to the Investigating Officer because the investigation was not completed and what he did with the five VCDs, nobody would know. To make matters worse, there is no proof of purchase in the form of any receipt.

(v) Lastly, the issue of non-compliance of s. 36 of the Act. Section 36 of the Act states:

> 36. (1) Where any seizure is made under this part, the Enforcement Officer or police officer making the seizure shall prepare a list of every film, film-publicity material book, document or other thing seized and of the place in which it is found and shall sign the list.

The defence had cited a *dictum* from Raja Azlan Shah (as His Highness then was) in the case of *San Soo Ha v. PP* [1968] 1 MLJ 34 wherein at p. 36, His Lordship opined:

> In my view, the provisions of the section are to be strictly followed by the extent it is possible to ensure that the incriminating articles obtained as a result of the search were recovered as alleged and leaves no room for doubt and to exclude the possibility of any concoction or malpractice of any kind.

Following this passage the defence had based on s. 36 of the Act which provides that where any seizure is made, the enforcement officer making the seizure shall prepare a list of every film, submitted the importance of complying with the mandatory requirement of preparing a search list.

On this issue, with due respect to both Mr. Siew Chen Fui and Mr. Roger Chin, I find that they have not quoted the relevant passage in *San Soo Ha's* case (*ibid*) in toto and therefore they have misconstrued what was the *ratio decidendi*. The issue before the learned judge then was whether the accused was prejudiced as the search officer had failed to prepare a search list in compliance with s. 64 of the CPC. Apart from the passage quoted above, the learned judge further said:

> This section bears some resemblance to s. 103 of the Indian Criminal Procedure Code "which is more exhaustive than ours. *Conviction or acquittal of an accused person invariably depends upon the credibility of witnesses as assessed by the trial court and never on the question whether a particular legal procedure has been compiled with. The most that can be said about the failure to comply with the provision relating to search list is that it may cast doubt upon the bona fides of the parties conducting the search and accordingly afford ground*

for scrutiny; but if after close scrutiny the court arrives at the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible. (See *Bashir v. Emperor*; AIR 1932 All 185. *Bhattacharjee v. Emperor* AIR 1940 Cal 85). In the present case the learned president had explored the evidence and came to the conclusion that the stolen articles were recovered from the possession of the appellant. I am therefore unable to see how the failure to prepare a search list by itself would entitle the appellant to an acquittal.

(Emphasis added)

Based on the emboldened portion taken from the passage quoted above, the principle to be gleaned is the effect of non-compliance of the provision governing a search list merely cast doubt on the *bona fides* of the parties conducting the search and it then becomes incumbent on the trial judge to scrutinise the evidence further whether a *prima facie* case has made out.

In the context of the present case, the identity of the 18 VCDs is central to proving that the accused had possession of them and the absence of the listing of each of the titles of the 18 VCDs greatly weakens the case for the prosecution.

2nd Ground

Under the 2nd ground the prosecution submitted that the learned Magistrate had erred in law and in fact when he came to his finding that the prosecution has failed to prove that all of exh. P1, ie, the remaining 14 VCD (video cakera padat) seized are obscene films and disregarded PW5's evidence that the result of a screen test conducted on the seized items has shown that all these items are obscene films.

Under the 2nd ground, in my view, it would be unsafe for the court to solely rely on PW5's evidence that he had conducted a screen test on all the 18 VCD's and that they were all obscene films because I find that exh. P5 which was prepared by him in respect of the 18 VCDs handed to him lacked evidential value and besides there was a material contradiction as from whom he received the 18 VCDs (discussed earlier).

Therefore, the screening of each and everyone of the 18 VCDs is necessary to determine whether they were obscene films becomes critical. Here as per the finding of the learned Magistrate not only were only four VCDs screened but unfortunately the titles of the four VCDs were not even identified. Hence, there is no evidence before the court of which of the four VCDs out of the 18 VCDs exh. P1 (A-R) were of obscene material and neither was there proof whether the remaining 14 VCDs were of obscene material or otherwise.

I agree with the defence that the learned Magistrate should not be faulted just because he had allowed the prosecution's application to conduct random screening. In my opinion the permission granted by the learned Magistrate is not tantamount to a waiver of the burden emplaced on the prosecution to prove each and every essential ingredient of the charge for purposes of establishing a *prima facie* case. It is the duty of the prosecution throughout to establish a *prima facie* case and it is not for the learned Magistrate, as pointed out by the defence, to tell them as to the correct procedure to be adopted.

3rd Ground

Under the 3rd ground, the prosecution contended that the learned Magistrate had erred in law and in fact when he considered failure to prove which one of the items seized is obscene is a fatal blow to the prosecution's case.

In my view this 3rd ground is intertwined with the 2nd ground above and therefore I do not propose to deal with it again.

4th Ground

Basically under the 4th ground, the prosecution is urging the court to invoke s. 158 of the CPC and to amend the charge to four VCDs instead of the current 18 VCDs. Here, I am in agreement with the defence that this ground cannot be sustained. To amend the charge to possession of the four VCDs entails the court to be satisfied that a *prima facie* case has been made out ie, the prosecution has proved beyond reasonable doubt that the accused had in his possession the four VCDs and that the four VCDs was of obscene material. However, as I have explained earlier this is woefully lacking.

Conclusion

For all the foregoing reasons, I find there are no grounds for me to interfere with the findings of the learned Magistrate. I affirm the decision of the learned Magistrate and the appeal of the appellant against the accused's acquittal and discharge without the defence being called is hereby dismissed.